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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re WILLIE SCOGGINS on Habeas Corpus.	C084358 (Super. Ct. No. 08F04643)

Samuel Wilson was murdered during the attempted commission of a robbery set up by Willie Scoggins. Wilson had previously sold Scoggins three boxes purportedly containing 50-inch flat-screen televisions. The boxes actually contained plywood wrapped in bubble wrap. A few days later, Wilson encountered Scoggins's girlfriend, Shaneil Cooks, and her friend, Jennifer Kane, in a parking lot and offered Cooks the same deal. Cooks informed Scoggins via text message that she found the man who had hustled him. A short time later, Cooks and Kane lured Wilson to a different parking lot under the guise of making a purchase. When Wilson arrived, in addition to Cooks and Kane, he found two of Scoggins's friends, James Howard and Randall Powell. Scoggins was also nearby, in an adjacent parking lot. The plan, devised by Scoggins, was for Howard and Powell to rob and "beat the shit out of" Wilson. When Wilson ran, Powell shot and killed him.

In 2011, a jury convicted Scoggins of first degree murder (Pen. Code, §§ 187, 189)[1], finding true a robbery-murder special circumstance allegation (§ 190.2, subd. (a)(17)), and attempted robbery (§§ 664/211). The jury also found a principal was armed during the commission of the offenses. (§ 12022, subd. (a)(1).) As we explain more fully in the discussion portion of the opinion, section 190.2, subdivision (d), provides in relevant part that "every person, not the actual killer, who, *with reckless indifference to human life and as a major participant*, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole . . . ." (Italics added.) Based on this provision, the trial court sentenced Scoggins to serve life without the possibility of parole in state prison. In 2014, we affirmed the judgment entered against Scoggins and rejected, among other assertions, his claim the robbery-murder special circumstance finding was unsupported by sufficient substantial evidence he acted with reckless indifference to human life. (*People v. Kane et al., Howard, & Scoggins* (Apr. 7, 2014, C068209, C068210, C068971) [nonpub. opn.].) Our Supreme Court denied his petition for review.

Thereafter, in 2015 and 2016, Scoggins filed various petitions for writ of habeas corpus in the Sacramento County Superior Court and in this court, again challenging the sufficiency of the evidence supporting the robbery-murder special circumstance finding. Each was denied. In May 2016, Scoggins filed a petition for writ of habeas corpus in our Supreme Court, also challenging the special circumstance finding. In the meantime, that court decided *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*), setting forth factors to be

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1 Undesignated statutory references are to the Penal Code.

used in determining whether or not a defendant's "participation 'in criminal activities known to carry a grave risk of death' [citation] was sufficiently significant to be considered 'major' [citations]" (*id*. at p. 803), rendering him or her statutorily eligible for the death penalty or life imprisonment without possibility of parole under section 190.2, subdivision (d). While Scoggins's habeas corpus petition was pending, our Supreme Court also decided *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*), setting forth factors to be used in determining whether or not a defendant has "exhibited 'reckless indifference to human life' within the meaning of [that subdivision]" (*id*. at p. 618) and holding as a matter of first impression that "a defendant's apparent efforts to minimize the risk of violence" is a relevant factor in the analysis. (*Id*. at p. 622.)

In March 2017, our Supreme Court ordered the Secretary of the Department of Corrections and Rehabilitation to show cause, returnable to this court, as to why Scoggins is not entitled to relief in light of *Banks, supra,* 61 Cal.4th 788 and *Clark, supra*, 63 Cal.4th 522. Having reviewed the return to the order to show cause, as well as Scoggins's traverse thereto, we conclude these decisions do not entitle Scoggins to relief. As we explain more fully below, there is a spectrum of conduct and culpability ranging from a simple getaway driver, whose participation in the planned robbery was minimal and who harbored no culpable mental state greater than an intent to participate in the robbery, to the actual killer who intended to kill the victim. A sentence of death or life without parole is warranted for those at the latter end of the spectrum, but not the former. Most cases, however, are not so straightforward. Scoggins is at neither end of this spectrum. His conduct and mental state fall somewhere between these extremes. As *Banks, supra,* 61 Cal.4th 788 and *Clark, supra*, 63 Cal.4th 522 make clear, in order to qualify for the most severe punishments authorized by law, Scoggins must have been a major participant in the attempted robbery of Wilson and must have exhibited reckless indifference to his life. That is the line dividing the gray area of the spectrum.

In this case, there is little doubt Scoggins was a major participant in the attempted robbery. His involvement was substantial. He not only planned the robbery, but also planned a violent assault to be delivered by two of his friends as payback for Wilson's fake television scam. Scoggins also watched his plan unfold from a nearby vantage point and entered the crime scene after events turned deadly, not to render assistance, but in an attempt to frustrate the investigation by giving false exculpatory statements to the responding officers. Whether or not Scoggins exhibited reckless indifference to human life is a closer call, but we conclude the record adequately supports such a finding. While Scoggins was not the shooter, or in a position to stop Powell from pulling the trigger, and apparently did not know a gun would be used during the planned robbery, he did plan for the robbery to include physical violence against Wilson. Such violence was to be carried out, as mentioned, by two friends, one of whom Scoggins knew to be a "hot head." Thus, this case is unlike *Clark, supra,* 63 Cal.4th 522, where the planned robbery did not include violence as part of the plan. And perhaps more importantly, whereas the plan for the robbery in *Clark* contained concrete steps aimed at minimizing the risk of violence of any kind, here, not only did the plan itself call for Powell and Howard to "beat the shit out of" Wilson, but it also contained no effort to minimize the risk that such violence would result in death. In sum, we conclude the record adequately supports a conclusion Scoggins was both a major participant in this attempted robbery and exhibited reckless indifference to human life in carrying it out.

FACTS

We provide a condensed version of the facts we previously set forth in *People v. Scoggins, supra,* C068971. However, for reasons explained therein, the facts recited in

those consolidated appeals were based on the record produced in Howard's appeal; this condensed version relies entirely on the record produced in Scoggins's appeal.[2]

In June 2008, Scoggins sold crack cocaine out of a house in South Sacramento known as "the Trap." Lorenzo McCoy, a partner in Scoggins's drug dealing business, lived at the Trap. Scoggins, Howard, and Powell were close friends and referred to each other as "brothers." At the time of the murder, Powell was dating Kane. Scoggins was dating Cooks. Cooks and Kane were also close friends.

A few days before the murder, Scoggins bought what he believed to be three flat-screen televisions from Wilson. After returning to the Trap, he discovered he actually purchased three flat-screen television boxes containing plywood wrapped in bubble wrap. Scoggins was upset that he had been swindled.

On June 8, 2008, Cooks and Kane were driving around in a white van. Wilson was driving around in a blue van selling plywood as flat-screen televisions. The vans crossed paths in a parking lot and Wilson made his pitch. Kane gave Wilson her cell phone number and told Wilson she would ask her mother whether she wanted to buy a television. At 5:40 p.m., apparently during Wilson's sales pitch, Kane called Powell and said, "they found the guy that sold them the fake TVs." Powell was with another girlfriend when he received this phone call and left her house saying, "he was going to meet his brother [Howard]." Around this time, Cooks called Scoggins, but got his voicemail. At 5:50 p.m., Powell called Scoggins and also got his voicemail. A few minutes later, Powell called Scoggins again. This call was answered. At 5:55 p.m., Cooks sent the following text message to Scoggins: "Man you ain't answering the phone and the dude that sold you the TVs is in my face right now."

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[2] We grant Scoggins's request to take judicial notice of the record in that appeal, *People v. Scoggins, supra*, C068971. (Evid. Code, § 452, subd. (d).)

Meanwhile, after obtaining Kane's phone number, Wilson apparently pretended he had to return to work and drove away. A short time later, he called Kane and asked whether she had talked to her mother. Kane responded: "Yeah, I talked to my mom, she want it." Wilson said he could take a break from work if Kane's mother would meet him to make the purchase. When asked for her mother's phone number, Kane gave him Cooks's cell phone number. Wilson then called Cooks, who pretended to be Kane's mother, and told her he could take a break from work to make the sale. Wilson told Cooks to meet him at Burlington Coat Factory on Florin Road in 10 minutes. Cooks agreed.

Shortly before 6:00 p.m., while apparently on his way to meet Howard at the Trap, Powell called Scoggins several times and his call was sent to voicemail each time. Around the same time, Scoggins called McCoy at the Trap and told him that he found the man who had sold him the fake televisions. Scoggins told McCoy the plan was to meet the seller at Burlington Coat Factory and "beat the shit out of him and get the fucking money back." Howard was present at the Trap and also talked to Scoggins. Powell arrived at some point and also told McCoy about the plan. Howard and Powell left the Trap a short time later.

At about 6:30 p.m., when Wilson arrived at Burlington Coat Factory, he called Cooks and told her to instead meet him at the Shell gas station across the street. Cooks and Kane met Wilson in a small parking lot directly to the east of the Shell station. When Wilson got out of his van to make the sale, he was confronted by Powell and Howard. During the confrontation, Powell pulled a semi-automatic handgun and fired three or four rounds. Wilson ran. Powell then fired two or three additional rounds, striking Wilson twice in the back. Wilson did not survive these injuries.

When Wilson was shot and killed by Powell, Scoggins was at the Shell station. According to one of his statements to law enforcement officers following the murder, he was in his car at a gas pump on the west side of the Shell station when he heard "five, six

shots," but did not see what happened. He claimed he was there to meet another of his girlfriends and it was a "crazy" coincidence his girlfriend Cooks was in the adjacent parking lot when the shooting happened. However, from all of the evidence, including the exchanges of phone calls and text messages recounted above and McCoy's testimony concerning Scoggins's plan to rob and violently assault Wilson, the jury could have reasonably concluded Scoggins was in the adjacent parking lot to watch his planned robbery unfold.

After the shooting, Powell and Howard got into the white van and Kane, who was driving the van, quickly pulled onto Florin Road. Scoggins pulled out of the Shell station and entered the parking lot where Wilson lay bleeding on the ground. He did so, according to his statement to police, because the other girlfriend he claimed he was supposed to be meeting was in that parking lot with some of her friends. This person testified that while she had previously dated Scoggins, they were not seeing each other at the time and had not planned to meet at that parking lot or anywhere else. Scoggins told her she should leave before police arrived or she likely would not be able to do so after they taped off the parking lot. He then drove his car across the street, parked at the Burlington Coat Factory, and returned on foot to provide a statement to police, who were then arriving on the scene. After providing an exculpatory statement, Scoggins went to the Trap, where he discussed the shooting with McCoy, Powell, and Howard.

DISCUSSION

I

Procedural Bars to Habeas Corpus Relief

"The right to habeas corpus is guaranteed by the state Constitution and 'may not be suspended unless required by public safety in cases of rebellion or invasion.' (Cal. Const., art. I, § 11.) Frequently used to challenge criminal convictions already affirmed on appeal, the writ of habeas corpus permits a person deprived of his or her freedom, such as a prisoner, to bring before a court evidence from outside the trial or appellate

record, and often represents a prisoner's last chance to obtain judicial review. . . . 'Historically, habeas corpus provided an avenue of relief for only those criminal defendants confined by a judgment of a court that lacked fundamental jurisdiction, that is, jurisdiction over the person or subject matter' [citation], but that view has evolved in modern times and habeas corpus now 'permit[s] judicial inquiry into a variety of constitutional and jurisdictional issues' [citation]. 'Despite the substantive and procedural protections afforded those accused of committing crimes, the basic charters governing our society wisely hold open a final possibility for prisoners to prove their convictions were obtained unjustly. [Citations.] A writ of "[h]abeas corpus may thus provide an avenue of relief to those unjustly incarcerated when the normal method of relief—i.e., direct appeal—is inadequate." ' [Citations.]" (*In re Reno* (2012) 55 Cal.4th 428, 449-450 (*Reno*).)

Notwithstanding "the importance of the 'Great Writ,' " our Supreme Court has established procedural rules limiting its use. (*In re Clark* (1993) 5 Cal.4th 750, 763-764, superseded by statute on other grounds as stated in *Briggs v. Brown* (2017) 3 Cal.5th 808.) We first note sufficiency of the evidence claims generally may not be raised in a petition for writ of habeas corpus. (*Reno, supra,* 55 Cal.4th at p. 514; *In re Lindley* (1947) 29 Cal.2d 709, 723.) Another procedural rule "has come to be known as the *Waltreus*[3] rule; that is, legal claims that have previously been raised and rejected on direct appeal ordinarily cannot be reraised in a collateral attack by filing a petition for a writ of habeas corpus." (*Reno, supra,* 55 Cal.4th at p. 476.) This rule is "consistent with the very nature of habeas corpus" as "an extraordinary remedy applicable when the usual channels for vindicating rights—trial and appeal—have failed." (*Id.* at p. 477.) And because "habeas corpus cannot serve as a substitute for an appeal, . . . in the absence of

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3 *In re Waltreus* (1965) 62 Cal.2d 218.

special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." (*In re Dixon* (1953) 41 Cal.2d 756, 759 (*Dixon*).) This has come to be known as the *Dixon* rule.

Here, as previously mentioned, Scoggins challenged the sufficiency of the evidence supporting the special circumstance finding in his direct appeal, asserting the evidence did not support a finding he acted "with reckless indifference to human life." (§ 190.2, subd. (d).) We rejected that claim. He could have, but did not assert the evidence was insufficient to support a finding he was a "major participant" in the robbery-murder of Wilson. (*Ibid*.) Thus, unless there is an applicable exception, the former assertion is barred by the *Waltreus* rule and the latter is barred by the *Dixon* rule. Scoggins argues two exceptions apply: "(1) the superior court acted in excess of its jurisdiction, and (2) the law has changed in [his] favor . . . ." Each claimed exception is based on our Supreme Court's decisions in *Banks* and *Clark*. Accordingly, before addressing applicability of the exceptions, we describe these decisions in detail.

II

Banks and Clark

In *Banks*, *supra*, 61 Cal.4th 788, our Supreme Court interpreted section 190.2, subdivision (d), explaining that subdivision "was designed to codify the holding of *Tison v. Arizona* (1987) 481 U.S. 137[[95 L.Ed.2d 127] (*Tison*)], which articulates the constitutional limits on executing felony murderers who did not personally kill. *Tison* and a prior decision on which it is based, *Enmund v. Florida* (1982) 458 U.S. 782[[73 L.Ed.2d 1140] (*Enmund*)], collectively place conduct on a spectrum, with felony-murder participants eligible for death only when their involvement is substantial and they demonstrate a reckless indifference to the grave risk of death created by their actions." (*Banks*, *supra*, at p. 794.) Beginning with *Enmund*, our Supreme Court explained the high court reversed a death sentence where the defendant, Enmund, was the getaway

driver in a planned armed robbery that resulted in the unplanned murder of the robbery victim and his wife. "The court found a broad consensus against imposing death in cases 'where the defendant did not commit the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder.' [Citation.] Accordingly, it held the Eighth Amendment bars the death penalty for any felony-murder aider and abettor 'who does not himself [or herself] kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.' [Citation.] The intent to commit an armed robbery is insufficient; absent the further 'intention of participating in or facilitating a murder' [citation], a defendant who acts as 'the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape' [citation] cannot constitutionally be sentenced to death." (*Id*. at p. 799.)

Turning to *Tison, supra,* 481 U.S. 137, our Supreme Court explained the high court upheld death sentences where the defendants, Ricky and Raymond Tison, along with a third brother, "helped plan and carry out the escape of two convicted murderers from prison," including their father, Gary Tison, who "was serving a life sentence for killing a guard in the course of a previous escape." (*Banks*, *supra*, 61 Cal.4th at p. 802.) The Tison brothers brought "a cache of weapons to prison, arm[ed] both murderers, and [held] at gunpoint guards and visitors alike." (*Ibid*.) "During the subsequent escape, their car, already down to its spare tire, suffered another flat, so [they] agreed to flag down a passing motorist in order to steal a replacement car. Raymond waved down a family of four; the others then emerged from hiding and captured the family at gunpoint. Raymond and [the third brother] drove the family into the desert in the Tisons' original car with the others following. Ricky and [his father's] cellmate removed the family's possessions from their car and transferred the Tison gang's possessions to it; Gary and his cellmate then killed all four family members." (*Id*. at p. 799.)

After "endorsing *Enmund*'s holding that the Eighth Amendment limits the ability of states to impose death for 'felony murder *simpliciter*[,]' . . . *Tison* described the range

of felony-murder participants as a spectrum. At one extreme were people like 'Enmund himself: the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state.' [Citation.] At the other extreme were actual killers and those who attempted or intended to kill. [Citation.] Under *Enmund*, *Tison* held, death was disproportional and impermissible for those at the former pole, but permissible for those at the latter. [Citation.] The Supreme Court then addressed the gray area in between, the proportionality of capital punishment for felony-murder participants who, like the two surviving Tison brothers, fell 'into neither of these neat categories.' [Citation.] Here, the court announced, 'major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.' [Citation.] This is the language the electorate codified in section 190.2[, subdivision](d)." (*Banks, supra,* 61 Cal.4th at p. 800.)

Elaborating on the actus reas requirement of major participation, our Supreme Court endorsed a "gloss" placed on that phrase by this court in *People v. Proby* (1998) 60 Cal.App.4th 922, i.e., "that a defendant must have been actively and substantially involved in the events leading up to a murder," but further explained: "A sentencing court must examine the defendant's *personal* role in the crimes leading to the victim's death and weigh the defendant's individual responsibility for the loss of life, not just his or her vicarious responsibility for the underlying crime." (*Banks, supra,* 61 Cal.4th at p. 801.) The court then set forth the following factors to be used in determining whether or not a "defendant's participation 'in criminal activities known to carry a grave risk of death' [citation] was sufficiently significant to be considered 'major' [citations]" under section 190.2, subdivision (d): "What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the

other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used? No one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question . . . ." (*Id*. at p. 803.)

Applying this multi-factor test to the facts in *Banks*, the court held the evidence was not sufficient to support a robbery-murder special circumstance finding as to one of the defendants, Matthews, who was the getaway driver for an armed robbery during which another defendant, Banks, shot and killed one of the robbery victims. (*Banks*, *supra*, 61 Cal.4th at pp. 804-805.) The court explained: "The evidence in the record places Matthews at the *Enmund* pole of the *Tison–Enmund* spectrum. Indeed, as Matthews argues, his conduct is virtually indistinguishable from Earl Enmund's. No evidence was introduced establishing Matthews's role, if any, in planning the robbery. No evidence was introduced establishing Matthews's role, if any, in procuring weapons. Matthews and two confederates—though not the shooter—were gang members, but, in contrast to the convicted murderers the Tison brothers chose to free and arm, no evidence was introduced that Matthews[or these confederates] had themselves previously committed murder, attempted murder, or any other violent crime. The crime itself was an armed robbery; *Enmund* and *Tison* together demonstrate that participation in an armed robbery, without more, does not involve 'engaging in criminal activities known to carry a grave risk of death.' [Citation.] During the robbery and murder, Matthews was absent from the scene, sitting in a car and waiting. There was no evidence he saw or heard the shooting, that he could have seen or heard the shooting, or that he had any immediate role in instigating it or could have prevented it." (*Id*. at p. 805, internal fns. omitted.) The court concluded: "On this record, Matthews was, in short, no more than a getaway driver, guilty like Earl Enmund of 'felony murder *simpliciter*' [citations] but nothing greater. As such, he is ineligible for the death penalty under *Tison* and *Enmund*. Because

section 190.2[, subdivision](d) incorporates the *Tison–Enmund* standard, if the evidence was insufficient to make Matthews death eligible under these cases, the evidence was also insufficient to find the special circumstance true and Matthews eligible for life imprisonment without parole under state law." (*Ibid*.)

Finally, with respect to the mens rea requirement of reckless indifference to human life, the court explained that "*Tison,* and in turn section 190.2[, subdivision](d), look to whether a defendant has ' "knowingly engag[ed] in criminal activities known to carry a grave risk of death." ' [Citations.] The defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed, demonstrating reckless indifference to the significant risk of death his or her actions create." (*Banks, supra*, 61 Cal.4th at p. 801.) Holding the evidence was also insufficient to establish this mental state, the court explained: "There was evidence from which the jury could infer Matthews knew he was participating in an armed robbery. But nothing at trial supported the conclusion beyond a reasonable doubt that Matthews knew his own actions would involve a grave risk of death. There was no evidence Matthews intended to kill or, unlike the Tisons, knowingly conspired with accomplices known to have killed before. Instead, as in *Enmund*, Banks's killing of [the victim] was apparently a spontaneous response to armed resistance from the victim." (*Id*. at p. 807.)

In *Clark, supra*, 63 Cal.4th 522, our Supreme Court vacated robbery-murder and burglary-murder special circumstance findings where the defendant was not merely guilty of felony murder *simpliciter*, but was rather "the mastermind who planned and organized the attempted robbery and who was orchestrating the events at the scene of the crime." (*Id*. at p. 612.) There, the defendant and his brother and cousin conducted surveillance of a computer store, studying the number of employees and their activities around closing time. Defendant also secured use of a U-Haul truck by having another person rent the truck using a false driver's license defendant helped her procure. (*Id*. at pp. 536, 612.) The plan was for one man, Ervin, to enter the store around closing time with a gun, which

was "apparently [supposed] to be unloaded," and handcuff the remaining employees in the restroom so no one could call the police. (*Id*. at p. 613.) Then, while defendant sat in the parking lot in a BMW, his brother and another man, who apparently believed the store belonged to defendant, were to help Ervin remove computers from the store and load them into the U-Haul that was parked nearby. However, before any computers could be removed, the mother of one of the handcuffed employees came into the store. Ervin shot her in the head and fled to defendant's car. Defendant drove away, leaving Ervin to be apprehended in the parking lot by an officer who heard the gunshot while on patrol near the store. The gun Ervin used to murder the victim had been loaded with one bullet. (*Id*. at pp. 536-538, 613.)

Beginning with "the *Banks* factors concerning major participation," the court stated: "[W]e can conclude that defendant had a prominent, if not the most prominent, role in planning the criminal enterprise that led to the death of [the victim]. No evidence was presented about defendant's role in supplying the weapon, although inferences can be drawn from [the evidence] that use of a weapon was part of his plan for the robbery. No evidence was presented about defendant's awareness of the particular dangers posed by the crime, beyond his concern to schedule the robbery after the store's closing time. No evidence was presented about his awareness of the past experience or conduct of Ervin, the shooter. Defendant was in the area during the robbery, orchestrating the second wave of the burglary after Ervin secured the store, but defendant was not in the immediate area where Ervin shot [the victim]." (*Clark*, *supra*, 63 Cal.4th at pp. 613-614.) The court then noted it previously upheld a major participant finding where "the defendant, although not present at the murder, was 'the founder, ringleader, and mastermind behind' a criminal gang engaged in carjacking," and gave "his subordinate gang members . . . 'a carjacking tutorial and instructed them that a resisting victim was to be shot.' " (*Id*. at p. 614, quoting *People v. Williams* (2015) 61 Cal.4th 1244, 1281.) However, the court declined to decide whether or not the defendant qualified as a major

participant under the *Banks* factors, concluding instead "the evidence was insufficient to support that he exhibited reckless indifference to human life." (*Ibid.*)

Before assessing the evidence supporting this mens rea element, the court noted the two elements are interrelated such that " 'the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life.' " (*Clark*, *supra*, 63 Cal.4th at p. 614, quoting *Tison*, *supra*, 481 U.S. at p. 153.) At the same time, even significant participation in an armed robbery does not necessarily entail possession of that mental state. (See *id*. at p. 617 [armed robbery, "on its own and with nothing more presented, is not sufficient to support a finding of reckless indifference to human life"].) "*Tison* held that the necessary mens rea for death eligibility may be 'implicit in knowingly engaging in criminal activities known to carry a grave risk of death.' [Citation.] As examples, the high court cited: 'the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property,' and 'the person who tortures another not caring whether the victim lives or dies' as two examples of such murderers. [Citation.] Notably, both examples involve a defendant who personally killed the victim—not, as in this case, *Enmund*, *Tison*, or *Banks*, a vicariously liable defendant who was not the actual killer. Nevertheless, these examples provide some indication of the high court's view of 'reckless indifference,' namely, that it encompasses a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions." (*Id*. at pp. 616-617.) The court then explained the Model Penal Code's definition of recklessness contains subjective and objective elements: "The subjective element is the defendant's conscious disregard of risks known to him or her. But recklessness is not determined merely by reference to a defendant's subjective feeling that he or she is engaging in risky activities. Rather, recklessness is also determined by

an objective standard, namely what 'a law-abiding person would observe in the actor's situation.' [Citation.]" (*Id*. at p. 617.)

The court then applied the following factors to the facts before it in determining whether or not the defendant was recklessly indifferent to human life within the meaning of section 190.2, subdivision (d): Did the defendant know a gun would be used and/or personally use a gun during the robbery? Was the defendant physically present at the scene of the murder, and therefore provided with an opportunity to restrain the murderer or aid the victim? What was the duration of the interaction between the perpetrators and the victims? Did the defendant have knowledge of his or her cohort's likelihood of killing? Did the defendant apparently take steps to minimize the risk of violence? The first four factors were culled from case law; the fifth was added as a matter of first impression. (*Clark*, *supra*, 63 Cal.4th at pp. 618-622.) With respect to the latter factor, the court explained: "If the evidence supports an argument that defendant engaged in efforts to minimize the risk of violence in the felony, defendant may raise that argument and the appellate court shall consider it as being part of all the relevant circumstances that considered together go towards supporting or failing to support the jury's finding of reckless indifference to human life. But the existence of evidence that defendant made some effort to minimize the risk of violence does not, in itself, necessarily foreclose a finding that defendant acted with reckless indifference to human life . . . ." (*Id*. at p. 622.) This is because, as noted above, recklessness has both subjective and objective elements. Thus, "a defendant's good faith but unreasonable belief that he or she was not posing a risk to human life in pursuing the felony does not suffice to foreclose a determination of reckless indifference to human life under *Tison*." (*Ibid*.)

Applying the foregoing factors, the court held the evidence did not support a conclusion the defendant was recklessly indifferent to human life. The court explained while the defendant knew a gun would be used, that fact alone is insufficient to establish reckless indifference. The only gun used during the attempted robbery was carried by

Ervin, not the defendant, and that gun was loaded with only one bullet. (*Clark, supra,* 63 Cal.4th at pp. 618-619.) Unlike *Tison*, where the Tison brothers were "physically present during the entire sequence of events culminating in the murders," and were therefore presented with "an opportunity to act as a restraining influence on murderous cohorts," the defendant in *Clark* was in his car in the parking lot when the victim was shot and was not provided with such an opportunity. (*Id*. at p. 619.) Acknowledging "[t]he jury may have inferred that [the defendant] was aware [the victim] had been shot when he drove from the scene," indicating a "desire to flee the scene as quickly as possible, without regard for [the] welfare . . . of the shooting victim," the court nevertheless distinguished this level of culpability from that of the Tison brothers because, "unlike in [*Tison*], defendant would have known that help in the form of police intervention was arriving." (*Id*. at p. 620.)

With respect to duration of the interaction between victims and perpetrators, the court noted the defendant planned the robbery for closing time, when most employees would be gone, and those who remained would be handcuffed in the bathroom. Thus, while the robbery would take some time to complete, "the period of interaction between perpetrators and victims was designed to be limited." (*Clark, supra,* at p. 620.) At the same time, the court explained, "[b]ecause the robbery was planned for a public space and involved the prolonged detention of employees, the crime did involve the risk of interlopers, such as [the murder victim]. But overall, the evidence was insufficient to show that the duration of the felony under these circumstances supported the conclusion that defendant exhibited a reckless indifference to human life." (*Id*. at pp. 620-621.) There was no evidence Ervin was known to have a propensity for violence or the defendant had any knowledge of such a propensity. (*Id*. at p. 621.)

Finally, the court considered the defendant's "apparent efforts to minimize the risks of violence," i.e., (1) the robbery was planned for closing time when most employees would be gone, (2) the gun was apparently supposed to have been unloaded,

and (3) the gun was loaded with only one bullet (*Clark*, *supra*, at pp. 621-622), and concluded: "Defendant's culpability for [the victim's] murder resides in his role as planner and organizer, or as the one who set the crime in motion, rather than in his actions on the ground in the immediate events leading up to her murder. But also relevant to his culpability as planner, there is evidence supporting that defendant planned the crime with an eye to minimizing the possibilities for violence. Such a factor does not, in itself, necessarily preclude a finding of reckless indifference to human life. But here there appears to be nothing in the plan that one can point to that elevated the risk to human life beyond those risks inherent in any armed robbery. Given defendant's apparent efforts to minimize violence and the relative paucity of other evidence to support a finding of reckless indifference to human life, we conclude that insufficient evidence supports the robbery-murder and burglary-murder special circumstance findings, and we therefore vacate them." (*Id.* at p. 623.)

III

Exceptions to the Waltreus/Dixon *Rules*

We now turn to the question of whether *Banks* and *Clark* entitle Scoggins to reraise, and also broaden, his challenge to the sufficiency of the evidence to support his robbery-murder special circumstance in this petition for habeas corpus. Scoggins argues two exceptions to the *Waltreus/Dixon* rules apply: "(1) the superior court acted in excess of its jurisdiction, and (2) the law has changed in [his] favor . . . ." We address each exception in turn.

A.

Excess of Jurisdiction

"Habeas corpus is available in cases where the court has acted in excess of its jurisdiction. [Citations.] For purposes of this writ as well as prohibition or certiorari, the term 'jurisdiction' is not limited to its fundamental meaning, and in such proceedings judicial acts may be restrained or annulled if determined to be in excess of the court's

powers as defined by constitutional provision, statute, or rules developed by courts. [Citations.] In accordance with these principles a defendant is entitled to habeas corpus if there is no material dispute as to the facts relating to his [or her] conviction and if it appears that the statute under which he [or she] was convicted did not prohibit his conduct." (*In re Zerbe* (1964) 60 Cal.2d 666, 666-668.)

In *People v. Mutch* (1971) 4 Cal.3d 389 (*Mutch*), our Supreme Court applied this exception to the *Waltreus/Dixon* rules to allow the defendant to raise a sufficiency of the evidence claim after his conviction became final. There, the defendant was convicted of kidnapping for purposes of robbery under section 209. At the time, the court had "construed the words 'kidnaps or carries away' to mean the act of forcibly moving the victim any distance whatever, no matter how short or for what purpose." (*Id*. at p. 393.) After the defendant's conviction became final, the court decided *People v. Daniels* (1969) 71 Cal.2d 1119 (*Daniels*), holding, "the intent of the Legislature in amending [that section] was to exclude from its reach . . . those [robberies] in which the movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself." (*Id*. at p. 1139.) As the court explained in *Mutch*, "the purpose of our decision in *Daniels* was not to 'redefine' the crime of [kidnapping] to commit robbery—under our tripartite system of government, that power is vested exclusively in the legislative branch—but simply to declare what the intent of the Legislature has been in this regard since the enactment of the 1951 amendment to section 209." (*Mutch*, *supra*, at p. 394.) Because there was "no material dispute as to the nature and extent of the movements which [the] defendant compelled his victims to perform," and under a proper reading of the statute those movements "did not amount to the conduct proscribed by section 209" (*id*. at p. 397), the defendant was entitled to habeas corpus relief from his improper conviction. (*Id*. at p. 399.)

Here, just as *Daniels* declared the intent of the Legislature in amending section 209, our Supreme Court's decision in *Banks* declared the intent of the electorate in enacting section 190.2, subdivision (d), i.e., "to bring 'state law into conformity with[*Tison*]' . . . ." (*Banks*, *supra*, 61 Cal.4th at p. 798.) In order to carry out that intent, the court set forth a list of factors, drawn from *Tison* and *Enmund*, relevant to determining whether or not sufficient substantial evidence supports a finding the defendant was a major participant within the meaning of section 190.2, subdivision (d). *Clark* then did the same with respect to the mens rea element of the special circumstance. (*Clark*, *supra*, 63 Cal.4th at pp. 618-622.) Thus, if there is no material dispute as to the facts relevant to Scoggins's placement on the spectrum between Enmund and the Tison brothers, and a proper reading of the statute, i.e., one that includes use of the multi-factor tests set forth in *Banks* and *Clark*, places Scoggins's conduct far enough on the Enmund side of the spectrum to preclude eligibility for the death penalty or life without parole, he would be entitled to habeas corpus relief from the special circumstance finding.

There is no material dispute as to the facts relevant to Scoggins's placement on the spectrum between Enmund and the Tison brothers. Scoggins desired payback for Wilson's fake television scam. When Cooks and Kane encountered Wilson the day of the murder and informed Scoggins, he hastily put together a plan to rob and "beat the shit out of" Wilson, using his close friends Howard and Powell to carry out the violent retribution while he oversaw events from a nearby vantage point. Scoggins chose neither the time nor the location for the robbery, as those depended on when and where Wilson wanted to meet Cooks and Kane to attempt to run the same scam on them. In all, Scoggins had less than an hour to make the plan and set it in motion. But unlike the plan devised by the defendant in *Clark*, the plan was exceedingly simple: rob and violently assault Wilson when he showed up to meet Cooks and Kane. When Powell pulled a gun and fired off a few rounds, Wilson ran. Powell then shot him twice in the back. Powell, Howard, Cooks, and Kane then fled together while Scoggins, who was nearby but not

close enough to obviously have been involved, stayed at the scene to provide a statement to the responding officers before rejoining his accomplices at the Trap.

The question, then, is: Do these facts render Scoggins ineligible for the special circumstance? If so, the sentence of life without parole was imposed in excess of jurisdiction and Scoggins is entitled to habeas corpus relief. We therefore apply the *Banks/Clark* factors to these facts.

1. *Major Participation*

What role did the defendant have in planning the criminal enterprise that led to one or more deaths? Unlike the defendants in *Enmund* and *Banks*, Scoggins is not merely guilty of felony murder *simpliciter*. Instead, like the defendant in *Clark*, he was the one who planned and set this robbery-murder in motion. However, his participation was also not as extensive as that of the Tison brothers or the "ringleader" in *People v. Marshall* (1990) 50 Cal.3d 907 (*Marshall*), who devised a plan to steal guns from the home of a childhood friend when no one was supposed to be home and " 'command[ed] the mission' as its 'leader[,]' " deciding to continue with the plan after it was determined someone, the ultimate murder victim, was home. (*Id*. at pp. 921, 938.) Nevertheless, Scoggins's planning activity was at least as substantial as that of the defendants in *People v. Mora* (1995) 39 Cal.App.4th 607, 617, and *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1754, who each assisted in the planning of an armed robbery that resulted in death and were held to be major participants based in part on that planning activity. Here, Scoggins was the source of the plan to rob and violently assault Wilson.

What role did the defendant have in supplying or using lethal weapons? There is no evidence Scoggins supplied the gun Powell used to murder Wilson. Nor is there any evidence Scoggins himself was armed or used a weapon.

What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Scoggins, as the planner of this particular robbery, was fully aware the robbery would

include violence. The plan was to "beat the shit out of [Wilson] and get the fucking money back." While there is no evidence he knew Powell was armed, nor is there any evidence he was surprised Powell had the gun or surprised Powell shot Wilson. (See *People v. Bustos*, *supra*, 23 Cal.App.4th at p. 1754.) By his own account of events, he calmly drove from the Shell station to the adjacent parking lot where Wilson lay bleeding on the ground, told a former girlfriend who was also in that parking lot to leave before police arrived if she did not want to be stuck there, drove across the street to the Burlington Coat Factory parking lot, where he parked his car, and then returned to the crime scene on foot to provide an exculpatory statement to police. These actions are not consistent with someone who was surprised by the violent turn of events.

Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? As already indicated, Scoggins was not in the parking lot where Wilson was fatally shot. He was in the Shell parking lot a short distance away. From all the evidence, a jury could have reasonably concluded he was there to watch events unfold from a distance. Indeed, having been the one who was scammed by Wilson, Scoggins likely concluded he needed to be out of sight in order for Wilson to get out of his van to make the deal. Thus, while Scoggins was nearby, we cannot conclude he was in a position to facilitate or prevent Wilson's murder. In this regard, the case is similar to *Clark*, where the defendant "was in the area during the robbery . . . but defendant was not in the immediate area where Ervin shot [the victim]." (*Clark, supra*, 63 Cal.4th at pp. 613-614.)

What did the defendant do after lethal force was used? As mentioned, after the shooting, Scoggins drove to the parking lot where Powell shot Wilson. However, he did so not to render aid to Wilson, but rather to attempt to convince a former girlfriend who was in that parking lot to leave before police arrived. He then drove across the street to park his car and returned to the scene on foot to provide a statement to the responding

officers in order to make it appear as though he was simply a witness and not involved in the murder. Nevertheless, because others were in the parking lot rendering assistance and calling for help, this factor is essentially a wash.

In all, we conclude these factors support the conclusion Scoggins was a major participant in the robbery-murder. As our Supreme Court explained in *Banks*, *supra*, 61Cal.4th 788: "No one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question." (*Id*. at p. 803.) Here, we have planning activity that included violence against the victim as an element of the plan. Based on Scoggins's personal role in this robbery-murder, we have no difficulty concluding he was "actively and substantially involved in the events leading up to [the] murder." (*Id*. at p. 801.) Indeed, aside from the shooter, of the five people involved, Scoggins's role was by far the most important.

2. *Reckless Indifference to Human Life*

Several of the *Clark* factors overlap the *Banks* factors discussed above. However, we now view those factors as bearing on the question of Scoggins's mental state rather than his status as a major participant.

Did the defendant know a gun would be used and/or personally use a gun during the robbery? Again, there is no evidence Scoggins personally used a gun during the robbery or knew Powell had one. Similarly, in *Clark*, the defendant who planned the robbery did not use a gun; and while he knew a gun was to be used, the court credited evidence indicating that gun was supposed to be unloaded. We see little practical difference between a defendant with no knowledge of a gun's presence and one with such knowledge but who honestly believes it is unloaded. Thus, this factor cuts in Scoggins's favor.

Was the defendant physically present at the scene of the murder, and therefore provided with an opportunity to restrain the murderer or aid the victim? As we have already explained, we must conclude the answer to this question is no, at least with

respect to Scoggins's ability to prevent Powell from shooting Wilson. There is no evidence Scoggins was close enough to do so. And with respect to aiding Wilson, we have already explained that factor is a wash since others were calling for emergency assistance when Scoggins got to the adjacent parking lot.

What was the duration of the interaction between the perpetrators and the victims? We conclude this factor is largely irrelevant to the facts of this case. It was relevant in *Clark, supra,* 63 Cal.4th 522 because the defendant planned for a short and hopefully peaceful interaction between the gunman and the store employees as he took them to the restroom and handcuffed them. While resistance certainly could have occurred during this period of time, because that time period was short, the risk of the gunman using deadly force to enforce compliance was reduced. Here, the duration of the interaction between Wilson and Scoggins's enforcers was short because Scoggins planned for the interaction to be violent and Wilson ran.

Did the defendant have knowledge of his or her cohort's likelihood of killing? During oral argument, in response to questioning concerning this factor, the Attorney General relied on a portion of one of Scoggins's police interviews in which he claimed he did not know Powell was the shooter, but then said if Powell did shoot Wilson, "his hot head got him in trouble." Because Scoggins and Powell were close friends, the jury could have reasonably concluded he was in a position to know Powell was prone to quickly become angry or was easily provoked to violence. We cannot conclude from this, as the Attorney General further argued, that Scoggins also knew Powell was armed and therefore likely to shoot Wilson to death. However, because Scoggins's plan was for Powell and Howard to "beat the shit out of [Wilson] and get [Scoggins's] fucking money back," using a hothead for that purpose does make a resulting murder more likely than using someone with a more even disposition.

Did the defendant apparently take steps to minimize the risk of violence? No. This is the factor that most sharply distinguishes this case from *Clark*. As we have

described, the robbery in *Clark* was planned for closing time when most employees would be gone, the gun was apparently supposed to have been unloaded, and the gun was loaded with only one bullet. (*Clark*, *supra*, at pp. 621-622.) Our Supreme Court held these facts supported a conclusion the defendant "planned the crime with an eye to minimizing the possibilities for violence." (*Id*. at p. 623.) Moreover, the court continued, "there appears to be nothing in the plan that one can point to that elevated the risk to human life beyond those risks inherent in any armed robbery." (*Ibid*.) Here, far from planning the robbery with an eye to minimizing the possibility of violence, the plan itself included a violent assault. Thus, unlike *Clark*, the possibility of violence was not minimized, but rather assured. And while we accept for purposes of this analysis that Scoggins did not intend for that violence to be lethal, there is also nothing in the record to indicate he carefully planned a nonlethal assault on Wilson. Quite the contrary. The plan was hastily put together and simply involved Scoggins, Powell, and Howard going to the location Wilson selected to meet Cooks and Kane in order to rob and "beat the shit out of him."

In all, we conclude these factors support the conclusion Scoggins acted with reckless indifference to human life. As our Supreme Court has phrased the inquiry, he was "aware of and willingly involved in the violent manner in which the [attempted robbery was] committed, demonstrating reckless indifference to the significant risk of death his . . . actions create[d]." (*Banks*, *supra*, 61 Cal.4th at p. 801.)

B.

Change in the Law

Scoggins also argues he is entitled to reraise his sufficiency of the evidence claim despite the *Waltreus/Dixon* rules because *Banks* and *Clark* effected a "change in the law in petitioner's favor." (*In re Coley* (2012) 55 Cal.4th 524, 537.) This exception applies where a new rule of law must be applied retroactively to the petitioner's case despite finality of the judgment. (See *In re Jackson* (1964) 61 Cal.2d 500, 501-507 [petitioner

entitled to habeas corpus relief where certain evidentiary and other claims were raised and rejected in his appeal, but retroactive application of two subsequent decisions of our Supreme Court to the facts of petitioner's case established prejudicial error].) Here, however, as in *Mutch*, *supra*, 4 Cal.3d 389, the court in *Banks* and *Clark* "did not change any such evidentiary or procedural rules," but instead "confirmed a substantive definition of [the special circumstance] duly promulgated by the [electorate]." (*Id*. at p. 395.) In other words, the court did not change the law with respect to what was required to satisfy the special circumstance, but rather "declare[d] what the intent of the [electorate] has been in this regard since the enactment of [section 190.2, subdivision (d)]." (*Id*. at p. 394.) For this reason, there is no need to examine retroactivity of these decisions under the change in the law exception. (*Id*. at pp. 394-395.)

Nor does Scoggins argue application of the *Banks* and *Clark* factors to the facts of his case would be different under this exception as opposed to the excess of jurisdiction exception. We have already rejected his assertion *Banks* and *Clark* entitle him to relief. The same would be true even if we were to conclude these decisions set forth new rules of law.

IV

Due Process

Finally, defendant asserts he is entitled to habeas corpus relief because "the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." (*Fiore v. White* (2001) 531 U.S. 225, 228-229 [148 L.Ed.2d 629] (*Fiore*).) In *Fiore*, after the defendant's conviction for violating a certain Pennsylvania statute became final, that state's Supreme Court "interpreted the statute for the first time, and made clear that [the defendant's] conduct was not within its scope." (*Id*. at p. 226.) After granting certiorari to review the Third Circuit's decision reversing the district court's grant of habeas corpus relief, the United States Supreme Court certified a question to the Pennsylvania Supreme

Court, specifically whether its interpretation of the statute set forth in the new case stated the correct interpretation of the statute on the date of the defendant's conviction. The Pennsylvania Supreme Court answered that it did. (*Id*. at p. 228.) In light of this response, the high court held the conviction violated due process. The court explained that because the new case did not change the law of Pennsylvania, but rather clarified what the law was at the time of the defendant's conviction, there was "no issue of retroactivity." (*Ibid*.) Instead, the question was "simply whether Pennsylvania can, consistently with the Federal Due Process Clause, convict [the defendant] for conduct that its criminal statute, as properly interpreted, does not prohibit." (*Ibid*.) The high court held it could not.

Here, there is similarly no issue of retroactivity, as we have already explained. But unlike *Fiore*, the new cases upon which Scoggins relies—*Banks* and *Clark*—do not make clear Scoggins's conduct was not within the scope of section 190.2, subdivision (d). Instead, as we have explained in detail, Scoggins's conduct was far enough on the Tison brothers' side of the major participant-reckless indifference spectrum to qualify for the special circumstance. Accordingly, there was no violation of Scoggins's right to due process under the federal Constitution.

DISPOSITION

The order to show cause is discharged and the petition for writ of habeas corpus is denied.

/s/
HOCH, J.

I concur:

/s/
ROBIE, Acting P. J.

Renner, J., Concurring and Dissenting.

I concur in the majority opinion except for part III.A.2 of the Discussion, from which I respectfully dissent. I disagree with the majority's conclusion that Scoggins acted with reckless indifference to human life.

The majority sets out the applicable standard and its origins in detail, but one point requires additional emphasis: Awareness of a foreseeable risk of death is insufficient to establish a reckless indifference to human life; "only knowingly creating a 'grave risk of death' satisfies the constitutional minimum." (*People v. Banks* (2015) 61 Cal.4th 788, 808 (*Banks*).) The facts of this case are insufficient to establish the defendant knowingly created such a grave risk. To conclude otherwise turns *the planning* of an unarmed beating and robbery, that unexpectedly results in death, into a crime eligible for the death penalty or life without the possibility of parole. In my view, that expansive result deviates from the guidance of our Supreme Court limiting eligibility for these penalties.

As explained by the majority, in *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*), our Supreme Court identified the following factors to consider when determining whether a non-shooter aider and abettor acted with reckless indifference to human life in armed robbery felony murders: (1) knowledge of weapons, and use and number of weapons; (2) physical presence at the crime and opportunities to restrain the crime and/or aid the victim; (3) duration of the felony; (4) the defendant's knowledge of a cohort's likelihood of killing; and (5) the defendant's efforts to minimize the risks of the violence during the felony. (*Id.* at pp. 618-621.) While I agree with the majority's conclusions regarding several of these factors, I review them each individually to explain why, on balance, they demonstrate that Scoggins was not recklessly indifferent to human life as that concept has been defined by our Supreme Court.

1. *Knowledge of Weapons, and Use and Number of Weapons*

"A defendant's *use* of a firearm, even if the defendant does not kill the victim or the evidence does not establish which armed robber killed the victim, can be significant to the analysis of reckless indifference to human life." (*Clark, supra*, 63 Cal.4th at p. 618.) But a defendant's awareness that a gun will be used in the felony is not enough by itself to establish reckless indifference to human life. (*Ibid*.) Here, there is no evidence Scoggins personally used a gun during the robbery or knew that Powell had one. As the majority concedes, this factor cuts in Scoggins's favor. (Maj. opn. *ante*, at p. 23.) I strongly agree with the majority on this point, and would emphasize that the gun that killed Wilson was not part of Scoggins's plan.

2. *Physical Presence at the Crime and Opportunities to Restrain the Crime and/or Aid the Victim*

"In *Tison*[*v. Arizona* (1987) 481 U.S. 137, [95 L.Ed.2d 127] (*Tison*)] the high court stressed the importance of presence to culpability. Each Tison brother was physically present during the entire sequence of events culminating in the murders. [Citation.] Proximity to the murder and the events leading up to it may be particularly significant where, as in *Tison*, the murder is a culmination or a foreseeable result of several intermediate steps, or where the participant who personally commits the murder exhibits behavior tending to suggest a willingness to use lethal force. In such cases, 'the defendant's presence allows him to observe his cohorts so that it is fair to conclude that he shared in their actions and mental state. . . . [Moreover,] the defendant's presence gives him an opportunity to act as a restraining influence on murderous cohorts. If the defendant fails to act as a restraining influence, then the defendant is arguably more at fault for the resulting murders.' " (*Clark, supra,* 63 Cal.4th at p. 619.) The majority concludes Scoggins was not close enough to prevent Powell from shooting Wilson. (Maj. opn. *ante*, at p. 23.) Further, Scoggins was not physically present at the scene of the murder. While he was within view of the scene, the evidence shows that he was

purposefully far enough from the actual crime scene to prevent the victim from realizing he was about to be robbed. "At the same time, physical presence is not invariably a prerequisite to demonstrating reckless indifference to human life. Where, for example, a defendant instructs other members of a criminal gang carrying out carjackings at his behest to shoot any resisting victims, he need not be present when his subordinates carry out the instruction in order to be found to be recklessly indifferent to the lives of the victims." (*Clark, supra,* at p. 619.) As in *Clark*, there was no evidence Scoggins instructed Powell to use *lethal* force. (*Ibid.*) The plan was generally to "beat the shit out of [Wilson] and get the fucking money back." The failure to render aid may also be considered. (*Ibid.*) The majority concludes this particular question results in a wash. (Maj. opn. *ante*, at p. 23.) While I agree, the factor as a whole is not neutral. In my view, the fact that Scoggins drove separately to view the robbery as his cohorts conducted it meant he lost control over the unfolding of those events, and our ability to infer that he shared Powell's mental state is weakened. (See *Clark, supra,* at p. 620 ["Defendant's absence from the scene of the killing and the ambiguous circumstances surrounding his hasty departure make it difficult to infer his frame of mind concerning Lee's death"].) Overall, the second factor does not suggest Scoggins shared in Powell's decision to shoot the victim or exhibited a reckless indifference to human life.

3. *Duration of the Felony*

"Courts have looked to whether a murder came at the end of a prolonged period of restraint of the victims by defendant. . . . Where a victim is held at gunpoint, kidnapped, or otherwise restrained in the presence of perpetrators for prolonged periods, 'there is a greater window of opportunity for violence' [citation], possibly culminating in murder. The duration of the interaction between victims and perpetrators is therefore one consideration in assessing whether a defendant was recklessly indifferent to human life." (*Clark, supra,* 63 Cal.4th at p. 620, fn. omitted.) The majority concludes that this factor

was largely irrelevant to the facts of this case. (Maj. opn. *ante*, at p. 23.) I do not disagree.

4. *Scoggins's Knowledge of Powell's Likelihood of Killing*

"A defendant's knowledge of factors bearing on a cohort's likelihood of killing are significant to the analysis of reckless indifference to human life. Defendant's knowledge of such factors may be evident before the felony or may occur during the felony. *Tison*, for example, emphasized the fact that the Tison brothers brought an arsenal of lethal weapons into the prison which they then handed over to two convicted murderers, one of whom the brothers knew had killed a prison guard in the course of a previous escape attempt. [Citation.] The Supreme Court of Arizona, in affirming that a defendant had acted with reckless indifference to human life, noted that he was aware that his cohort in a series of robberies 'had a violent and explosive temper.' " (*Clark, supra*, 63 Cal.4th at p. 621.) Despite the significance of this factor, the evidence that Scoggins had knowledge Powell would likely kill the victim is notably absent. The majority observes that "because Scoggins's plan was for Powell and Howard to 'beat the shit out of [Wilson] and get [Scoggins's] fucking money back,' using a hothead for that purpose does make a resulting murder more likely than using someone with a more even disposition." (Maj. opn. *ante*, at p. 25.) But more likely than what?

As mentioned at the outset, merely creating a foreseeable risk of death is not enough. "Nationally, thousands of armed robberies occur each year; per *Enmund* [*v. Florida* (1982) 458 U.S. 782 [73 L.Ed.2d 1140]], only roughly 1 in 200 results in death." (*Banks, supra*, 61 Cal.4th at p. 811.) Our Supreme Court explained in *Banks* that "[a]wareness of no more than the foreseeable risk of death inherent in any armed crime is insufficient; only knowingly creating a 'grave risk of death' satisfies the constitutional minimum." (*Id*. at p. 808.) The fact that after the crime was committed defendant said, if Powell did shoot Wilson, "his hot head got him in trouble" is interesting, but this after-the-fact explanation for Powell's behavior is insufficient to support a conclusion that

defendant knew before the felony that Powell was *likely* to inflict either a deadly beating or carry and use a gun. In *Tison*, the evidence that a well-armed cohort was likely to *kill* was much clearer. In analyzing a record for sufficiency of the evidence, there is a fine line between reasonable inferences and speculation, but here the evidence Scoggins was aware that Powell was likely to kill falls on the side of speculation.

5. *Scoggins's Efforts to Minimize the Risks of the Violence During the Felony*

"[A] defendant's apparent efforts to minimize the risk of violence can be relevant to the reckless indifference to human life analysis. If the evidence supports an argument that defendant engaged in efforts to minimize the risk of violence in the felony, defendant may raise that argument and the appellate court shall consider it as being part of all the relevant circumstances that considered together go towards supporting or failing to support the jury's finding of reckless indifference to human life." (*Clark, supra,* 63 Cal.4th at p. 622.) In *Clark*, there was evidence in the record that the defendant had taken efforts to minimize the risks of violence: "First, the attempted robbery was undertaken after closing time, when most of the employees had left the building. Second, there were not supposed to be any bullets in the gun . . . . Third, the gun, as recovered after the shooting, had only been loaded with one bullet." (*Id.* at pp. 621-622.) The majority concludes that this is the factor that "most sharply distinguishes this case from *Clark*." (Maj. opn. *ante*, at p. 25.) I view the weight of this factor quite differently. The majority asserts the possibility of violence was assured, rather than minimized, as in *Clark*, because Scoggins planned a violent beating. (Maj. opn. *ante*, at p. 25.) This distinction hinges on the import of planning a violent, but unarmed, beating designed to recover money from the victim. Scoggins's plan included violence, certainly, but the need to minimize the risk of violence when planning an unarmed beating is less pressing than the need to minimize the risk of violence when planning an armed robbery. The record does not contain any indication the defendant planned a beating involving the use of weapons. This fact is, by itself, a significant step towards minimizing the likelihood

that the plan would result in a "grave risk of death." Thus, I cannot view Scoggins's failure to further minimize this risk as being sufficient to distinguish this case from *Clark*. Nor can I necessarily view this factor as dispositive in light of the lack of other factors suggesting reckless indifference on the part of Scoggins.

To summarize, after considering the "aspects of the present felony that provide insight into both the magnitude of the objective risk of lethal violence and a defendant's subjective awareness of that risk" (*Clark, supra*, 63 Cal.4th at p. 623), I conclude insufficient evidence supports the conclusion Scoggins acted with reckless indifference to human life. As in *Clark*, Scoggins's culpability for Wilson's murder "resides in his role as planner and organizer, or as the one who set the crime in motion, rather than in his actions on the ground in the immediate events leading up to [the] murder." (*Ibid.*) In *Clark*, our Supreme Court noted "there appears to be nothing in the plan that one can point to that elevated the risk to human life beyond those risks inherent in any armed robbery." (*Ibid.*) Here, there is little evidence regarding any plan, and what evidence there is does not suggest an elevated risk to human life beyond those risks inherent in an unarmed beating and robbery. The weapon used to kill Wilson was not part of the plan. Even the planning of an *armed* robbery does not, without more, support a conclusion of reckless indifference to human life. The evidence suggests Scoggins's plan created a risk to Wilson. But Powell's surprise deviation from that plan does not make Scoggins recklessly indifferent to Wilson's life. Accordingly, I respectfully dissent from part III.A.2.

/s/
RENNER, J.